No. 92-755

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FIRST NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

SUNSHINE-JR. FOOD STORES, INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION OF FIRST NATIONAL LIFE INSURANCE COMPANY FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq. ("ERISA"), preempts state law claims for breach of contract, tort, and an accounting in an action brought by an insurer against an employer under an ERISA employee welfare benefit plan.

2. Whether ERISA authorizes an award of monetary relief in an action brought by an insurer against an employer under an ERISA employee welfare benefit plan.

3. Whether an employer owes a fiduciary duty to its insurer when the employer collects, holds, and remits premiums from its employees and determines employee coverage for the insurer under an ERISA employee welfare benefit plan and the information provided to the insurer regarding such coverage is peculiarly and solely within the control of the employer.

4. Whether the acts of a dual agent who acts in the best interests of one party but not the other are chargeable to the entity for whom said agent is acting.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner/Plaintiff:

First National Life Insurance Company ("FNL")

Parent Corporation of FNL:
American Life Assurance Corporation

Parent Corporation of American Life Assurance Corporation:
New South Investment Corporation

Subsidiary of FNL:
Capitol Towers, Inc.-

Respondent/Defendant:
Sunshine-Jr. Food Stores, Inc.

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REFERENCE TO REPORT OF OPINIONS

The United States Court of Appeals for the Eleventh Circuit affirmed the trial court's judgment in *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546 (11th Cir. 1992), following a non-jury trial in which the trial court ruled in favor of the Defendant, Sunshine-Jr. Food Stores, Inc. ("Sunshine"), on the claims of the Plaintiff, First National Life Insurance Company ("FNL"). *See* A-1a - A-42a.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on May 13, 1992. A timely filed petition for rehearing and a suggestion for *en banc* consideration were denied by the United States Court of Appeals for the Eleventh Circuit on July 30, 1992.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The relevant statutory provisions are set out in the appendix hereto as follows:

Authority	Appendix Page
29 U.S.C. § 1109(a)	50a
29 U.S.C. § 1132(a)	51a
29 U.S.C. § 1144(a)	52a

STATEMENT OF THE CASE

Sunshine operates a chain of convenience stores. During the time period at issue in this case, it estab-

lished and funded an employee welfare benefit plan through the purchase of a group life and health insurance policy issued by FNL. The policy was in effect from August 1, 1983, until August 1, 1986, when Sunshine terminated it and obtained coverage from another insurance company.

FNL subsequently filed this action in the United States District Court for the Middle District of Alabama. The complaint asserted a claim for relief under ERISA as well as various state law claims against Sunshine. Federal jurisdiction existed based upon the federal question regarding the ERISA claim (28 U.S.C. § 1331) and diversity of citizenship between the parties (28 U.S.C. § 1332). FNL is an Alabama corporation, Sunshine is a Florida corporation, and the amount in controversy exceeded $50,000.

The policy issued by FNL provided health, medical, and disability coverage to those employees of Sunshine who were eligible to participate in the plan. The terms of the policy obligated Sunshine to enroll at least 75% of its eligible employees in the plan. To be eligible, an employee was required to work for the company for six months, followed by employment for a minimum of 30 hours per week or 1,000 hours per year. Eligible employees who were covered by another health insurance plan were allowed to opt out of coverage under the plan. To participate, the employee paid one-half of the insurance premium and Sunshine paid the other half. Sunshine bore the responsibility of enrolling all eligible employees who opted to participate.

Although the policy did not expressly delineate the details of the welfare benefit plan administration, the parties followed a relatively well-defined allocation of administrative responsibilities. For every billing period,

Sunshine prepared a computer printout of its currently enrolled employees, calculated and collected the appropriate premiums, and forwarded the printout and a premium check payable to FNL to Frank Ayers ("Ayers"), an insurance broker who assisted Sunshine in procuring the FNL policy. Ayers in turn forwarded the printout and premium check to FNL. The claims process typically called for the employee or his health care provider to submit a claim to Sunshine, which verified the claimant's employment status and forwarded the claim to Ayers. Ayers checked the accuracy of the claim, determined the appropriate rate under the policy, and forwarded the claim to FNL, which in turn issued a benefit check. At one point, FNL authorized Ayers to write benefit checks on FNL's bank account, but that authority was later rescinded.

Shortly after the second renewal of the policy, FNL requested information regarding participation levels from Sunshine; however, Sunshine refused to provide the requested material. Sunshine subsequently chose not to renew its contract with FNL. This lawsuit followed. FNL sought monetary relief under ERISA based on Sunshine's breach of certain terms of the policy, including improper payment of benefits and failure to maintain the requisite employee participation in the plan. FNL raised various state law claims against Sunshine as well, including breach of contract, breach of the duties of due care and good faith, willful and wanton conduct, misrepresentation, and failure to disclose material facts, and requested monetary damages and equitable relief, particularly an accounting.

Sunshine filed a motion for summary judgment, and FNL filed a motion to strike Sunshine's jury demand. The district court found that the benefits provided to

Sunshine's employees constituted an employee welfare benefit plan under ERISA. The district court then determined that ERISA preempted all of FNL's state law claims and granted summary judgment for Sunshine as to those causes of action. See A-43a. The court denied summary judgment as to the cause of action stated under ERISA and granted FNL's motion to strike jury demand. After a non-jury trial, the district court found in favor of Sunshine on FNL's ERISA claim and denied all relief requested. See A-24a. Sunshine then requested an award of attorneys' fees, which was denied.

FNL perfected a timely appeal to the United States Court of Appeals for the Eleventh Circuit on the issues of preemption, monetary and equitable relief under ERISA, the agency of Frank Ayers, and other issues not raised in this petition. Sunshine cross-appealed the denial of attorneys' fees. Jurisdiction in the Eleventh Circuit was posited on 28 U.S.C. § 1291. The Eleventh Circuit affirmed the district court on all issues. See A-6a.

ARGUMENT

FNL respectfully submits that the panel decision of the Eleventh Circuit in this case is contrary to or inconsistent with decisions rendered by this Honorable Court regarding preemption of state law claims by ERISA and the availability of monetary awards pursuant to ERISA, and that the precise questions here presented have not been, but should be, finally settled by this Court. FNL further represents to this Court that the questions presented by this petition have generated widely divergent opinions among the circuit courts of appeal and within some circuits. State

supreme courts are also divided in answering these questions. FNL therefore requests this Honorable Court to grant its petition for writ of certiorari and to once again enter the "thicket" of ERISA preemption in an effort to resolve the many existing differences of opinion relating to it. *See Gonzales v. Prudential Ins. Co. of America*, 901 F.2d 446, 451-52 (5th Cir. 1990).

A. ERISA Preemption

In the cases examined to date regarding preemption, this Court has often found state law causes of action preempted by ERISA. *See, e.g., FMC Corp. v. Holliday*, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990) (law that provided no right of subrogation in motor vehicle accident from claimant's recovery from benefit plan); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990) (state law claim that employee was discharged to prevent vesting of pension benefits); *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988) (law specifically exempting ERISA-covered benefits from generally applicable garnishment law); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (common law tort and contract actions asserting improper processing of a claim for benefits under ERISA benefit program); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983) (law forbidding discrimination in employee benefit programs on the basis of pregnancy); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S. Ct. 1895, 68 L. Ed. 2d 402 (1981) (law prohibiting offsets of worker compensation payments against pension benefits). The Court's decisions have recognized, however, that cer-

tain limitations to ERISA's preemption clause apply. A state law normally is not preempted if the statute does not require the establishment or maintenance of an ongoing plan or makes no reference to a plan. *See Mackey*, 486 U.S. at 841, 108 S. Ct. at 2192-93, 100 L. Ed. 2d at 851; *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12, 107 S. Ct. 2211, 2217-18, 96 L. Ed. 2d 1, 11-12 (1987). This Court has also held that state laws which create no potential for conflict with a federal statute, *Fort Halifax*, 482 U.S. at 6, 96 L. Ed. 2d at 8, and lawsuits against ERISA involving run-of-the-mill state law claims, *Mackey*, 486 U.S. at 833 & n.8, 108 S. Ct. at 2187 & n.8, 100 L. Ed. 2d at 846 & n.8, are not preempted. From these rulings, lower courts have taken many divergent paths.

FNL contends that its claims should not be preempted because they do not relate to the employee welfare benefit plan established in this case, because its claims are consistent with the purposes behind ERISA and its preemption provision, and because no adequate remedy is provided by ERISA. Although the Eleventh Circuit rejected FNL's position, other circuits have decided these issues differently.

1. Relation to Employee Benefit Plan

Section 514(a) of ERISA (29 U.S.C. § 1144(a)) provides that if a state law "relates to" an employee benefit plan, it is preempted. A law relates to an employee benefit plan "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 97, 77 L. Ed. 2d at 501. This Court has recognized, however, that relation to an ERISA plan does have limits. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."

Id., 463 U.S. at 100 n.21, 103 S. Ct. at 2901 n.21, 77 L. Ed. 2d at 503 n.21. *See, e.g., Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1281 (9th Cir. 1990) (ERISA does not preempt state income tax levy); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 147 (2d Cir.), *cert. denied*, 493 U.S. 811, 110 S. Ct. 57, 107 L. Ed. 2d 25 (1989) (ERISA does not preempt state escheat law); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 556 (6th Cir. 1987) (ERISA does not preempt municipal income tax of general applicability); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1470 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S. Ct. 884, 93 L. Ed. 2d 837 (1987) (ERISA does not preempt state law breach of fiduciary duty claims); *Rebaldo v. Cuomo*, 749 F.2d 133, 139 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008, 105 S. Ct. 2702, 86 L. Ed. 2d 718 (1985) (ERISA does not preempt state law regulating hospital fees). In discussing the connection required for a law to relate to an employee benefit plan, the Second Circuit found that such a connection exists when state law "prescribes either the type and amount of an employer's contributions to a plan, the rules and regulations under which the plan operates, or the nature and amount of the benefits provided thereunder." *General Elec. Co. v. New York State Dept. of Labor*, 891 F.2d 25, 29 (2d Cir. 1989), *cert. denied*, 496 U.S. 912, 110 S. Ct. 2603, 110 L.Ed. 2d 283 (1990) (citations omitted). The Fifth Circuit has held that claims which are peripherally connected to the concerns addressed by ERISA are not preempted, *Hartle v. Packard Elec.*, 877 F.2d 354, 356 (5th Cir. 1989), and that state law claims which do not affect the relations among the principal ERISA entities are not preempted, *Perkins v. Time*

Ins. Co., 898 F.2d 470, 473 (5th Cir. 1990). "What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans . . . ." *Borges*, 869 F.2d at 146.

2. Purposes of ERISA and Its Preemption Provision

The preemption of state laws was designed to promote consistency and uniformity in regulations governing fiduciary responsibilities and procedures for processing claims and paying benefits. *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir. 1990). ERISA's civil enforcement provisions represent a balancing of the need for prompt and fair claims settlement procedures versus the public interest in encouraging the formation of employee benefit plans. *Pilot Life*, 481 U.S. at 54, 107 S. Ct. at 1556, 95 L. Ed. 2d at 52. The underlying purpose of ERISA is to protect employees and beneficiaries in employee benefit plans. *Nachwalter v. Christie*, 805 F.2d 956, 960-61 (11th Cir. 1986). The purposes of ERISA do not require or suggest that claims should be preempted in cases where such claims would in no way impair the effectiveness of ERISA plans. FNL's claims involve a contract between it and Sunshine which happens to be an insurance contract that forms the basis of an employee benefit plan. Nothing about FNL's claims in the instant case could be construed to adversely affect employees and beneficiaries in the plan. When a state law "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the [law] has some economic impact on the plan does not require that the [law] be invalidated." *Hospice of Metro Denver Inc. v. Group Health*

Ins. of Oklahoma, Inc., 944 F.2d 752, 754 (10th Cir. 1991) (quoting *Rebaldo*, 749 F.2d at 139).

Application of traditional contract defense in ERISA actions is not unprecedented. *Nash v. Trustees of Boston University*, 946 F.2d 960, 966 (1st Cir. 1991) (holding that claim for fraud in the inducement was not preempted). "The legislative purpose and public policy activating ERISA would be advanced by accommodating the affirmative defense of fraud in the inducement within the developing reserve of federal common law." *Id.* at 965. *See also Krause v. Dresser Industries, Inc.*, 910 F.2d 674, 680 (10th Cir. 1990) (ERISA does not preempt breach of contract claim solely for lost salary); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116 (4th Cir. 1989) (state law claims for breach of contract, promissory estoppel, and negligent misrepresentation are not preempted where claims do not question eligibility for plan benefits); *Rockney v. Blohorn*, 877 F.2d 637 (8th Cir. 1989) (claim that corporate officers are personally liable under terms of a pension plan covered by ERISA is a contract action, and appropriate state contract law should apply); *Hartle*, 877 F.2d at 356 (ERISA does not preempt contract action on theory of tenured employment not seeking plan benefits); *HealthAmerica v. Menton*, 551 So. 2d 235 (Ala. 1989) (ERISA does not preempt claim for fraudulent inducement); *Teper v. Park West Galleries, Inc.*, 431 Mich. 202, 427 N.W. 2d 535 (1988) (employee's claim for breach of employment contract, including claim for future pension benefits, not preempted by ERISA).

3. Availability of Adequate Remedy

A number of courts have foreclosed the availability of any remedy to plaintiffs whose state law claims have been preempted by ERISA by following a restrictive

interpretation of § 502(a) of ERISA (29 U.S.C. § 1132(a)). *See, e.g., First Nat'l Life*, 960 F.2d at 1550 (argument that ERISA provides inadequate remedy is insufficient reason to overcome language of statute); *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 11 (2d Cir. 1992) (preclusion of remedy does not bar ERISA preemption); *Cromwell v. Equicor-Equitable HCA* Corp., 944 F.2d 1272, 1276 (6th Cir. 1991), *cert. dismissed*, ___ U.S. ___ , ___ S. Ct. ___ ,120 L.Ed. 2d 931, 192 U.S. Lexis 4763 (1992) and *cert. denied*, 15 Employee Benefits Cas. (BNA) 2056 (1992) (unavailability of remedy irrelevant to analysis of scope of federal preemption); *Lee v. E. I. DuPont de Nemours and Co.*, 894 F.2d 755, 757 (5th Cir. 1990) (ERISA preempts state law claims of fraud and misrepresentation regardless of whether ERISA provided any remedy for claimed wrong); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 579, 112 L. Ed. 2d 584 (1990) (availability of a federal remedy is not a prerequisite for federal preemption); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S. Ct. 1893, 95 L. Ed. 2d 500 (1987) (a "gap" in the law does not undermine the reasoning on which a finding of preemption is based). *But see Cromwell*, 944 F.2d at 1286 (Jones, J., dissenting) (prior caselaw in circuit recognized that availability of remedy was relevant factor to consider in determining preemption); *Provident Life & Acc. Ins. Co. v. Waller*, 906 F.2d 985 (4th Cir.), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 512, 112 L. Ed. 2d 524 (1990) (court created federal common law rule of unjust enrichment to recover funds advanced to plan participant); *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157, 162 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093, 110 S. Ct. 1166, 107 L. Ed. 2d 1068 (1990) (preemption

should apply to state law claim only if Congress has created a remedy for the wrong suffered).

4. Conclusion

Consistency and uniformity in opinions among the various circuits has been impossible to maintain in the area of ERISA preemption. Even within circuits, holdings vary greatly from panel to panel and judge to judge. For example, the Eleventh Circuit has generally taken a strict approach to ERISA preemption. *See, e.g., National Cos. Health Benefit Plan v. St. Joseph's Hosp.*, 929 F.2d 1558 (11th Cir. 1991) (ERISA preempts all state common law claims relating to employee benefit plans, including equitable estoppel claims); *Williams v. Wright*, 927 F.2d 1540 (11th Cir. 1991) (contract claims with regard to monetary payments and insurance benefits under retirement contract preempted); *Mullenix v. Aetna Life & Cas. Ins. Co.*, 912 F.2d 1406 (11th Cir. 1990) (cause of action based on Alabama statute regarding chiropractic services preempted); *Farlow v. Union Cen. Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989) (claim for fraud in the inducement preempted); *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430 (11th Cir.), *cert. denied*, 493 U.S. 855, 110 S. Ct. 158, 107 L. Ed. 2d 116 (1989) (common law causes of action for bad faith refusal to pay benefits, fraud, and breach of contract held preempted); *Anschultz v. Connecticut General Life Ins. Co.*, 850 F.2d 1467 (11th Cir. 1988) (state law providing civil penalties against insurers who did not promptly settle claims or attempt to settle claims in good faith held preempted); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987) (gap in the law legitimate if it is result intended by Congress). *But see Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1243

(11th Cir. 1989), in which the court held that the "mere existence of pendent jurisdiction does not automatically qualify the state claim as 'related' to the ERISA claim by virtue of the common factual setting." The court recognized that even though ERISA preemption must be given a broad construction, there are limits. "ERISA's preemption . . . [provision] surely does not extend to every state law claim that, however remotely, factually involves an employee benefit plan." *Id.* at 1243 (quoting *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1571 n.8 (11th Cir. 1988)) (ellipsis in *Clark*). *See also Sanson v. General Motors Corp.*, 966 F.2d 618, 623 (11th Cir. 1992) (Birch, J., dissenting) ("this case represents the point at which the preemption tide should be stayed"). In *Sanson*, Judge Birch discussed the limits to ERISA's preemption clause as they related to a cause of action for fraud. "To preempt a cause of action, it is not enough that the particular facts of a plaintiff's claim happen to fortuitously involve a pension plan." *Id.* at 624. Judge Birch's dissent also noted that the plaintiff in *Sanson* had no effective parallel ERISA cause of action, and that the policy served by ERISA's preemptive force (requiring plaintiffs to assert federal causes of action to ensure uniform pension law) was absent in the case. Other circuits have similar disparate opinions. *See, e.g., General Elec.*, 891 F.2d at 25 (holding state law governing labor costs preempted by ERISA); *Id.* at 31 (Pratt, J., dissenting) (majority opinion departs from prior decisions); *Borges*, 869 F.2d at 148-49 (state escheat statute not preempted) [Second Circuit]; *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir.), *cert. denied*, 1992 U.S. Lexis 5637, 61 U.S.L.W. 3256 (1992) (claims for fraudulently induced retirement and wrongful termination preempted); *Memorial Hosp.*, 904 F.2d at 249-

50 (state law claims for negligent misrepresentation not preempted) [Fifth Circuit]; *Cromwell*, 944 F.2d at 1276 (breach of contract, promissory estoppel, misrepresentation, and breach of good faith claims preempted); *Id.* at 1283 (Jones, J., dissenting) (state law causes of action do not relate to benefit plan and are not preempted); *P*I*E*, 872 F.2d at 162 (fraud, promissory estoppel, and misrepresentation claims not preempted) [Sixth Circuit].

The circuit courts recognize the divergent opinions that have been issued in recent years on the subject of ERISA preemption, and many judges have expressed dissatisfaction with the current state of preemption law. *See, e.g., Sanson*, 966 F. 2d at 625 (Birch, J., dissenting) ("obviously the Supreme Court needs to do some serious bushhogging in the ERISA preemption thicket"); *Cromwell*, 944 F.2d at 1286 (Jones, J., dissenting) ("the courts have become consumed in a fervor of preemption, sometimes avoiding admittedly difficult and complex analysis, by simply presuming preemption to apply"); *Pitrat v. Garlikov*, 947 F.2d 419, 432 (9th Cir. 1991) (Sneed, J., dissenting) ("while ERISA preemption is easy to invoke and may marginally simplify the law, it does not always result in the best resolution of state and federal interests that present day federalism requires").

FNL respectfully contends that this Honorable Court should grant this petition for writ of certiorari and review the Eleventh Circuit's holding that FNL's state law claims are preempted by ERISA. The grounds hereinabove stated are more than ample to justify such action under Supreme Court Rule 10.1.

B. Monetary Relief Under ERISA

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985), this Court determined that § 409(a) of ERISA (29 U.S.C. § 1109(a)) did not authorize an award of punitive damages to a beneficiary as a result of a breach of fiduciary duty. The Court has not yet decided, however, whether extra-contractual damages can be recovered under § 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)). The *Russell* majority noted in dictum that § 502 does not mention the recovery of extra-contractual damages. 473 U.S. at 144, 87 L. Ed. 2d at 105. The dissent concluded that the statutory language "other appropriate equitable relief" authorizes the recovery of extra-contractual damages. *Russell*, 473 U.S. at 148-58, 105 S. Ct. at 3094-99, 87 L. Ed. 2d at 107-13 (Brennan, J., dissenting).

The circuit courts of appeal have also travelled divergent paths as to this issue. Most hold that punitive damages are not permitted for claims brought pursuant to § 502(a)(3). *See, e.g., Bishop v. Osborn Transp., Inc.*, 838 F.2d 1173 (11th Cir.), *cert. denied*, 488 U.S. 832, 109 S. Ct. 90, 102 L. Ed. 2d 66 (1988); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Sommers Drug Stores*, 793 F.2d at 1456; *Powell v. Chesapeake & Potomac Tel. Co. of Virginia*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170, 106 S. Ct. 2892, 90 L. Ed. 2d 980 (1986). Several circuit courts have also held that "extra-contractual" compensatory damages are not recoverable under § 502(a)(3). *See, e.g., United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096, 109 S. Ct. 1568, 103 L. Ed. 2d 935 (1989); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821

(1st Cir. 1988); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986). *But see Warren v. Society Nat'l Bank*, 905 F.2d 975 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2256, 114 L.Ed. 2d 709 (1991) (holding that monetary relief is available under ERISA if necessary to secure complete relief). *See also First Nat'l Life*, 960 F.2d at 1554 (Clark, J., specially concurring).

FNL submits that the *Warren* approach is the better reasoned and should be adopted by this Honorable Court. Extracontractual damages do not necessarily have to be labelled as "compensatory" or "punitive." Equitable relief may include monetary damages if necessary to do complete justice. *Walters v. Marathon Oil Co.*, 642 F.2d 1098 (7th Cir. 1981). In this case, FNL is entitled to monetary relief under § 502(a)(3) of ERISA for its contractually-related damages.[1]

The Eleventh Circuit relied on *Russell*, 473 U.S. at 134, 105 S. Ct. at 3085, 87 L. Ed. 2d at 96, and *Osborn Transp.*, 838 F.2d at 1173, in holding in this case that relief under ERISA is limited to that which

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[1] The Eleventh Circuit held that it would not reverse the district court's finding that FNL had not adequately proved *some* of the damages it asserted, because the finding was one of fact that could only be reversed if clearly erroneous. *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546, 1551-52 (11th Cir. 1992). While FNL contested that finding on appeal in the Eleventh Circuit and still contends that it adequately proved all of its damage claims, the affirmance of the finding proved to be mere dictum in view of the fact that other damages were clearly proven, and that the court of appeals, as well as the district court, also held that no monetary damages whatsoever were available under the pertinent ERISA provisions.

If the case is remanded either for a trial on the state law claims or for a determination of monetary relief under ERISA, the question of damages would presumably be addressed anew.

is equitable in nature. The Eleventh Circuit opinion does not mention, however, this Court's opinion in *Ingersoll-Rand*, wherein the Court concluded that there was "no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.' It is clear that the [monetary] relief requested here is well within the power of federal courts to provide." 498 U.S. at ___, 112 L. Ed. 2d at 488.

FNL still maintains that it is entitled to the equitable relief of an accounting. If such relief is ordered, then monetary relief is clearly awardable as an incident to that equitable relief. *Chauffeurs, Teamsters and Helpers v. Terry*, 494 U.S. 558, 110 S. Ct. 1339, 108 L. Ed. 2d 519 (1990); *Warren*, 905 F.2d at 982. Contrary to the Eleventh Circuit panel's opinion, an accounting is appropriate in this case because the accounts were mutual and complicated, if for no other reason. *See Worley v. Worley*, 388 So. 2d 502 (Ala. 1980); *Wooten v. Wooten*, 270 Ala. 191, 117 So. 2d 192 (1959).[2] FNL clearly relied upon Sunshine to fairly report the status of its employee workforce in order for FNL to determine its rights under the agreement between the parties. Only Sunshine could perform this function, because FNL had no access to the needed information except through Sunshine, and Sunshine did not respond to FNL's requests for information which would assist in making that determination. FNL had no way of knowing whether Sunshine was maintaining the proper participation levels required under the pol-

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[2] FNL's inability to obtain an accounting complicated its efforts to prove damages in this case. Since FNL was denied both an accounting and meaningful access to Sunshine's information, the only means available to FNL in proving its case was the expanded statistical analysis.

icy, as Sunshine alone maintained information as to eligibility and participation levels. Had an accounting been ordered, then FNL submits that payment of amounts due to FNL under the contract with Sunshine could have been ordered as a part of the total relief due to FNL.

FNL respectfully contends that this Honorable Court should grant this petition for writ of certiorari and review the Eleventh Circuit's holding that monetary relief is not available to FNL under ERISA. The grounds hereinabove stated are more than ample to justify such action under Supreme Court Rule 10.1.

C. Fiduciary Duty Owed By Sunshine to FNL

This Court has emphasized that ERISA's fiduciary requirements codify and make applicable to ERISA fiduciaries certain principles developed in the area of trust law. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). When trust law principles are applied, it is clear that Sunshine was not only a fiduciary with respect to the employee welfare benefit plan established in this case, but it was also a fiduciary with respect to FNL. Sunshine placed itself in a position of trust and confidence in relation to FNL by its exclusive access to employee records, and thus owed a duty to FNL to properly disclose information and account to FNL. The fact that Sunshine played different roles simultaneously should not alter this conclusion. A company acts as a fiduciary in administering a welfare plan in accordance with its terms. *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988). Certainly the fiduciary responsibility for doing so protects the plan and its beneficiaries, as the Eleventh Circuit panel noted in this case. *First Nat'l Life*, 960 F.2d at 1550. But for as long

as the contract existed between Sunshine and FNL, Sunshine also had fiduciary responsibility to FNL in the administration of this benefit plan according to its terms.

"A fiduciary is an agent who is required to treat his principal with utmost loyalty and care—treat him, indeed, as if the principal were himself." *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128-29 (7th Cir. 1992). In *Brasher v. First Nat'l Bank of Birmingham*, 232 Ala. 340, 344, 168 So. 42 (1936), the Alabama Supreme Court stated that where a relationship of trust and confidence exists between two parties, the party in whom the confidence is reposed has a duty to make full disclosure of all material facts within its knowledge relating to the matter in question, and any concealment of material facts is a fraud. FNL submits that the Eleventh Circuit disregarded established general principles of trust law in finding that Sunshine could not be held accountable to it as a fiduciary. Once established, then Alabama law provides that in a relationship which "afford[s] the power and means to one party to a transaction to take undue advantage of the other party," redress will be given to such other party if "there is found the slightest trace of undue influence or unfair advantage." *Brasher*, 232 Ala. at 344-45. Sunshine stood in a fiduciary relationship with FNL, and therefore, FNL should be entitled to an accounting and the damages resulting from Sunshine's breach of its fiduciary duty.

D. Dual Agency

FNL's entitlement to some of the relief sought in this case depends in part upon the status of Ayers as Sunshine's agent. The Eleventh Circuit's affirmance of the district court's finding that Ayers was the agent

of FNL but not of Sunshine fails to take into account FNL's contention that Ayers was the agent of both. *First Nat'l Life*, 960 F.2d at 1552. Such dual agency cannot be disputed, as Ayers himself characterized himself as the agent of both Sunshine and FNL. The agency relationship between Ayers and Sunshine was formed in the State of Florida. Under Florida law, "[w]hen a broker agrees to obtain insurance for a client, the broker becomes the client's agent. As agent, the broker owes his client a duty of care and a duty to exercise the skill he holds himself out as having." *Nu-Air Mfg. Co. v. Frank B. Hall & Co. of New York*, 822 F.2d 987, 997 (11th Cir. 1987) (citations omitted).

The law is clearly settled that an agent can be employed by two principals contemporaneously. *Sea Calm Shipping Co., S.A. v. Cooks*, 565 So. 2d 212 (Ala. 1990). Furthermore, an agent owes his principal a fiduciary duty and must act in the utmost good faith and make known to his principal all material facts that affect the subject matter of the agency. *Bay Shore Properties Inc. v. Drew Corp.*, 565 So. 2d 32 (Ala. 1990). When acting for two principals, the agent owes such fiduciary duty and good faith to both. In this case, Ayers acted for Sunshine to the detriment of FNL, thereby contributing to the damages suffered by FNL. A principal is liable for the acts of its agent performed in the interest of and in fulfillment of the principal's business so long as the agent is acting within the scope of his employment. *Cordes v. Wooten*, 476 So. 2d 89 (Ala. 1985). Sunshine should be liable for FNL's damages resulting from Ayers' actions.

CONCLUSION

FNL requests this Honorable Court to grant its petition for writ of certiorari for the following reasons:

(1) The opinion of the United States Court of Appeals for the Eleventh Circuit in this case is contrary to or inconsistent with decisions rendered by this Court.

(2) The questions presented herein have generated widely divergent opinions among the circuit courts of appeal and state supreme courts, causing confusion and inconsistency in the law.

(3) The questions presented herein have not been, but should be, settled by this Court.

Respectfully submitted,

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